# THE SEC'S CASE AGAINST MARK CUBAN HEADS TO TRIAL

Yesterday, in *S.E.C. v. Cuban*, No. 08-CV-2050, 2013 WL 791405 (N.D. Tex. March 5, 2013), a federal district court denied Mark Cuban's motion for summary judgment. The court held that although the question was "in some respects a close one," there was sufficient dispute over the evidence entitling the SEC to present its case to a jury. Barring settlement, this highly publicized case – predicated on the "misappropriation" theory of insider trading – will now proceed to trial.

## Factual and Procedural Background

The SEC's civil enforcement action arose from Mark Cuban's June 2004 sale of his 6.3% ownership interest in Mamma.com Inc. (now known as Copernic, Inc.). According to the SEC, during the spring of 2004, Mamma.com's executives decided to initiate a private investment in public equity ("PIPE") offering. When the company's CEO informed Cuban of the PIPE offering, Cuban allegedly agreed, orally, to keep the information confidential, and ended his call with the CEO by saying, "Well, now I'm screwed. I can't sell." Nevertheless, following a discussion with the investment bank conducting the offering, Cuban instructed his broker to sell his stake in Mamma.com. The next day, the company publicly announced the PIPE offering and the stock price declined. By selling prior to the announcement, Cuban avoided over $750,000 in losses.

In August 2009, the district court dismissed the SEC's complaint, holding that, even assuming the SEC's allegations were true, Cuban only agreed to keep confidential the information he received, and that the SEC did not adequately allege that he agreed to refrain from trading on it. Cuban, therefore, could not be held liable because an outsider who accepts material, nonpublic information on a confidential basis is not precluded from trading on that information absent a specific agreement not to trade. The SEC appealed to the Fifth Circuit, which reversed, finding that the SEC's allegations provided "more than a plausible basis to find that the understanding between the CEO and Cuban was that he was not to trade." After remand to the district court and further discovery, Cuban sought summary judgment arguing that there was insufficient evidence justifying a trial.

## The District Court's Summary Judgment Ruling

The court first rejected Cuban's argument that to establish his agreement to keep information about the PIPE offering confidential and not trade, the SEC had to demonstrate that there was a "valid offer and acceptance plus a meeting of the minds supported by consideration" regarding such an agreement. The court held that the SEC need only show the existence of an *implicit* agreement to maintain the confidentiality of Mamma.com's material, nonpublic information and to not trade on that information. The court concluded that a reasonable jury could find from the "I can't sell" comment that Cuban considered himself foreclosed from trading because he believed he had agreed to keep the information confidential. The court also noted that there was evidence that Cuban requested more information about the PIPE offering following the phone call, which could also lead a reasonable jury to find that Cuban and Mamma.com implicitly agreed that Cuban would not use the information for his own personal benefit. However, the court also noted that "there is substantial record evidence that Cuban did *not* ask to see the terms and conditions" of the PIPE offering and that Mamma.com's CEO invited Cuban to contact the investment bankers. In reaching its conclusion on this aspect of the ruling, "the court emphasize[d] the closeness of this call."

Cuban also argued that because he disclosed his intention to trade on the PIPE offering information, he could not be liable under a misappropriation theory. Although the court confirmed that if Cuban had disclosed his intention to trade, there could be no liability, the evidence was not clear that Cuban had disclosed his intention to sell his shares *before* Mamma.com announced the PIPE transaction. Importantly, the district court rejected the SEC's argument that Cuban was obligated to provide Mamma.com "sufficient time to take action to prevent the recipient's trading on the information."

Finally, the court rejected Cuban's argument that the SEC could not prove that information about the PIPE offering was material and nonpublic. The court held that materiality was a question for the jury and that there was evidence – including expert opinion on the dilutive effects of the PIPE offering – that the information disclosed to Cuban was material. The court further found that there was evidence that the PIPE information was nonpublic because it was provided to only a limited number of prospective investors and was not broadly disclosed to the investing public. In this regard, the court found significant that Cuban, Mamma.com's largest shareholder, was not aware of the PIPE offering until "the eve of the public announcement of the offering."

**Conclusion**

The "closeness" of the call on the issue of whether Cuban agreed not to trade, as well as the disputed evidentiary record generally, suggests that the credibility of the witnesses will be critical at trial. In the end, however, the lesson of *S.E.C. v. Cuban*, is that persons in possession of what might be material, nonpublic information should exercise extreme caution before engaging in securities trading – even when there is no express agreement to keep the information confidential or otherwise restrict its use. The fact that an "implied" agreement not to trade or keep information confidential may be sufficient to trigger the insider trading laws is a sobering reminder that communications between corporate insiders and outsiders should be conducted with extreme care. Expectations should be made clear and memorialized in writing whenever possible to prevent a clash of recollections, often many years after the events in question.

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If you have any questions concerning the foregoing or would like additional information, please contact Tariq Mundiya (212-728-8565, tmundiya@willkie.com); Todd G. Cosenza (212-728-8677, tcosenza@willkie.com); Norman P. Ostrove (212-728-8872, nostrove@willkie.com) or the attorney with whom you regularly work.

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